E COPY

FILED
NOV 25 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 72-279

VERNON J. KNOX,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.)

BRIEF FOR RESPONDENT IN OPPOSITION.

WILLIAM J. SCOTT
Attorney General, State of Illinois,

JAMES B. ZAGEL,
Assistant Attorney General,
188 West Randolph Street, Suite 2200,
Chicago, Illinois 60601,
(312-793-2570)

Attorneys for Respondents.

Printed by the Authority of the State of Illinois

INDEX.

PAGE

Jurisdiction 1
Questions Presented 1
Statement of The Case 2
Reasons For Denying The Writ 3
Conclusion 6

AUTHORITIES CITED.

Cases.

Beck v. *Washington*, 369 U.S. 541 (1962) 3
Campbell v. *United States*, 365 U.S. 85 (1961) 4
Herndon v. *Georgia*, 295 U.S. 441 (1955) 4
Kolod v. *United States*, 390 U.S. 136 (1968) 4
McGautha v. *California*, 402 U.S. 183 (1971) 4
Ogden v. *United States*, 303 F.2d 724 (9th Cir. 1962) 4
Parker v. *Illinois*, 333 U.S. 571 (1948) 3
People v. *Knox*, 3 Ill. App. 3d 22 (1971) 3
People v. *Knox*, 90 Ill. App. 2d 149 (1967) 2
Sanders v. *United States*, 316 F.2d 346 (D.C. Cir. 1963) 4
United States v. *Hoffa*, 436 F.2d 1243 (7th Cir. 1970) 5
United States v. *Keig*, 320 F.2d 634 (8th Cir. 1963) . 4
United States v. *Shotwell*, 355 U.S. 233 (1957) 4

Rules.

Illinois Supreme Court Rules 603 3

IN THE

Supreme Court of the United States

No.

VERNON J. KNOX,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT)

BRIEF FOR RESPONDENT IN OPPOSITION.

JURISDICTION.

The jurisdiction of this Court to consider the question presented by petitioner.

QUESTIONS PRESENTED.

Is certiorari available to consider a constitutional issue which was not properly raised in the state court.

Is the accused who secures a limited remand on appeal, so that the trial court may hear evidence and make findings concerning admissibility of the evidence, constitutionally entitled to a second full hearing on the unrelated issue of his sentence.

STATEMENT OF THE CASE.

The petitioner, an attorney, was convicted of larceny arising out of mortgage transactions in which he secured a mortgage loan from a banking institution of which his co-defendant was a principal officer and member of the loan committee. In essence the loan was made on the basis of fraudulent statements, the mortgages were later released without payment of the loan and the petitioner conveyed various sums to his co-defendant. The facts are stated in some detail in *People* v. *Knox*, 90 Ill. App. 2d 149, 234 N.E. 2d 128 (1967).

On the first appeal from the conviction, the Appellate Court rejected all of petitioner's contentions (which did not include an attack upon the sentence) except one. The Court ruled that the trial court erred in failing to conduct a hearing as to the voluntariness of two statements made by petitioner. The Court then remanded the case to the trial court to hold such a hearing. If the court found the statements involuntary, a new trial was to be granted. If the statements were voluntary, the Court was to "enter a new judgment and sentence in accordance with the verdict of the jury." 90 Ill. App. 2d at 167, 234 N.E. 2d at 136.

On remand, the trial court found that the statements were voluntary. The court then conducted a new hearing in aggravation and mitigation and sentenced the petitioner to a term of one to four years (compared to the original sentence of two to five). At the hearing, the petitioner sought probation but the trial court ruled that it had no power, under the Appellate Court mandate, to give probation. On appeal after remand, the petitioner argued solely that "Upon Remand of Case To The Trial Court, Jurisdiction Vested In That Court And Trial Judge Had Statutory Authority To Admit Defendant To Probation" (Deft's Br. 2, *People* v. *Knox*, No. 54118, App. Ct. First Dist.). The Appellate Court rejected this challenge and held that, under its mandate, the trial court was empowered "sole-

ly to rule upon the voluntariness of the two statements, and if it found the statements were voluntarily made, to enter a new judgment and to reinstate the original sentence of two to five years" *People* v. *Knox*, 3 Ill. App. 3d 22, 24; 278 N.E. 2d 252 (1971).

The petitioner then sought leave to appeal to the Supreme Court of Illinois. The Petition raised again the issue of whether the trial court had jurisdiction to grant probation. The argument was based upon state statutes and upon the Rules of the Illinois Supreme Court (Petition for Leave To Appeal, 4-7, *People* v. *Knox* Supreme Court of Illinois). The petition for leave to appeal was denied.

The petitioner then filed a petition for reconsideration of the denial of leave to appeal and there, for the first time, raised the constitutional claim.

REASONS FOR DENYING THE WRIT.

A.

The constitutional claim advanced by the petitioner was not properly presented to the state courts. The appeal from the trial court's sentence was taken to the Appellate Court which at that time was not the proper forum for constitutional claims. Rule 603, Illinois Supreme Court Rules (Ill. Rev. Stat., 1969, Ch. 110 A, R. 603). See *Parker* v. *Illinois*, 333 U.S. 571 (1948). Further, the arguments presented by petitioner were completely devoid of any constitutional cast, either state or federal. On leave to appeal, the petitioner similarly failed to put forward a constitutional claim. The issue, therefore, was not presented to the state courts and certiorari does not lie. See *Beck* v. *Washington*, 369 U.S. 541, 549-53 (1962).

Petitioner may claim that the issue was presented in a petition for reconsideration of the denial of leave to appeal. There is no provision for the filing of such a document under the

Rules of the Supreme Court of Illinois. And even if it were proper to seek such a rehearing, it is clear that a constitutional claim is raised too late when it is made for the first time in a petition for rehearing. *Herndon* v. *Georgia*, 295 U.S. 441 (1955).

Finally, it should be noted that these significant procedural deficiencies occur in the case of an accused who was himself a lawyer and had, at all stages of the case, the assistance of retained counsel.

B.

The petitioner seeks to frame the issue as one of denial of a hearing in aggravation and mitigation. All of the cases he cites concern the conduct of such hearings. The issue presented here has nothing to do with the conduct of such hearings. Nor does it concern the denial of such a hearing.*

The issue here is whether an accused is constitutionally entitled to a second hearing in aggravation and mitigation when a court of review has remanded the case to the trial court for a limited hearing upon an evidentiary matter. This Court has, on several occasions, made limited remands to trial courts. See *United States* v. *Shotwell*, 355 U.S. 233, 245-46 (1957); *Campbell* v. *United States*, 365 U.S. 85 (1961). The general purpose of the remand is to secure findings of fact upon a narrow and specified question. If the facts are resolved in favor of the prosecution the trial court enters a new final judgment "based upon the existing record as supplemented by its further findings." *Kolod* v. *United States*, 390 U.S. 136, 138 (1968). See also *Ogden* v. *United States*, 303 F.2d 724, 737-38 (9th Cir. 1962); *Sanders* v. *United States*, 316 F.2d 346, 350-51 (D.C. Cir. 1963); *United States* v. *Keig*, 320 F. 2d 634, 637 (8th Cir. 1963). It is difficult to understand the purpose of a limited remand if

* The respondent does not concede that a total denial of any aggravation hearing would be constitutional error. See *McGautha* v. *California*, 402 U.S. 183 (1971)

in fact the remand is not limited but includes taking additional evidence on the unrelated issue of sentence. It is impossible to reconcile the language of this Court stating that judgment is to be entered upon the "existing record" supplemented by limited finding with petitioner's contention that a limited remand re-opens the question of sentence. It seems clear to us that the re-opening of decided questions is an undesirable procedure on its merits (See *United States* v. *Haffa*, 436 F. 2d 1243, 1248 (7th Cir. 1970)) and one that has no constitutional sanction whatever.

CONCLUSION.

For the reasons stated, the Petition For A Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM J. SCOTT
Attorney General, State of Illinois,

JAMES B. ZAGEL,
Assistant Attorney General,
188 West Randolph Street, Suite 2200,
Chicago, Illinois 60601,
(312-793-2570)

Attorneys for Respondent.